Supreme Court, U.S.
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85-2095

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ABRAHAM RODOLITZ,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the trial judge's erroneous charge to the jury regarding the Insurance Law of the State of New York permit the petitioner to be convicted on an incorrect theory of law?

2. Did the government fail to establish, by legally sufficient evidence that petitioner tampered with a witness as contemplated by Title 18 U.S.C. Section 1512?

3. Did the government fail to establish by legally sufficient evidence, that petitioner's acts were intentional violations of the mail fraud statute (Title 18 U.S.C. Section 1341)?

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Petitioner Abraham Rodolitz respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 17, 1986 as well as the denial by said court of in banc relief on May 15, 1986.

Opinions Below

The opinions of the Court of Appeals are unreported and appear as Appendix A to this petition. The Court of Appeals affirmed the judgment entered, following a jury trial, in the United

States District Court for the Southern District of New York (Sprizzo, J.), convicting petitioner of three counts of mail fraud (18 U.S.C. §1341); and tampering with a witness (18 U.S.C. §1512). Petitioner was sentenced to a term of two years' imprisonment on each of the counts, to run concurrently, and a fine totaling $253,000.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within 60 days of the affirmance on May 15, 1986 by the Court of Appeals for the Second Circuit of petitioner's judgment of conviction and denial of in banc relief.

Constitutional Provisions Involved

United States Constitution, Amendment 14.
The provision appears in Appendix B to this petition.

Statutory Provisions Involved

18 United States Code §1341 and 1512. These provisions appear in Appendix C to this petition.

Statement of the Case

Abraham Rodolitz was convicted on March 27, 1985, in the United States District Court for the Southern District of New York, (Sprizzo, J.) following a jury trial.

The Petitioner was charged in a superceding indictment with various counts of mail fraud, tampering with a witness and conspiracy to obstruct. On December 13, 1984, the jury convicted Rodolitz of the mail fraud counts and the tampering count, the Court having dismissed the conspiracy charge at the conclusion of the Government's case.

On March 27, 1985, Judge Sprizzo sentenced Mr. Rodolitz to a total of two years imprisonment plus a fine in the amount of $253,000.00.

It was alleged that the Petitioner through his company "Oak Point Industrial Park" owned a warehouse that it leased to Alexanders Department Store chain. The warehouse sustained severe damage to its roof as the result of an October 9, 1976 windstorm. Petitioner unable to collect on the damage claim filed suit against his carrier in the Supreme Court, Queens County ultimately receiving a jury verdict in his favor for the amount claimed, some $1.2 million dollars.

The Government claimed that the value of the damages sought by the Petitioner was established by fraud and deception contending that Petitioner used a series of his own businesses to inflate the cost of repairs which he himself performed.

In addition to the scheme to defraud it was alleged that the Petitioner, during the Government's investigation attempted to obstruct it by advising a witness on how to testify when called before a Federal Grand Jury. In order to establish the Government's case numerous documents were introduced into evidence and the following witnesses testified:

ANTHONY MALEC, testified that since approximately 1970 he has worked for Alexander's as a maintenance mechanic and is currently a chief engineer at the Tiffany Street warehouse.*

In the fall of 1976, the roof was damaged for the second time by a windstorm, in two areas, approximately 60 by 80 feet and 50 by 30 feet in size.** In one area the steel decking was exposed while the other area remained covered only by the insulation (T 148).***

In 1976 when he went to the roof during the storm he saw it "blow off the roof, the tar, the paper, everything" and saw portions of the roof being raised up by the wind (T 165). Prior to the 1976 storm, the damage from 1972 storm had been repaired, but did not correct water tightness problems which previously existed (T 176).

He conceded that in 1977 when interviewed by insurance adjusters he indicated that during the 1976 storm he saw approximately one third of the roof lifting 6 to 12 inches off (T 187).

HARVEY GUIS, the former claims manager for the Hanover Insurance Company and the Massachusettes Bay Insurance Company (the insurer), described the New York standard fire policy as one which covered fire and lightning damage as well as costs of the removal of the damaged material. The standard policy can be endorsed as in the case at bar to cover wind storm damage. Under the standard policy a loss is determined by the actual cash value of the property destroyed. Actual cash value is determined by finding the cost to replace or repair the property with like kind and quality of material (replacement cost) less an allowance for depreciation (T 198).

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* The warehouse occupies approximately 400,000 square feet on one floor.

** This area had not previously been damaged during prior storms.

*** Numbers in parenthesis preceded by the letter "T" refer to pages in the transcript of the trial.

A policy can also be endorsed for replacement cost coverage which means that property would be replaced or repaired at current costs without any depreciation deduction (T 199). The policy involved in this matter was endorsed for replacement cost coverage (T 206).

Under the policy self-repairing is not prohibited, however one is not entitled to make a profit (T 208). The policy permits recovery as being limited to the smaller of the policy limits, the replacement cost (without depreciation) or the actual cost expended (out of pocket costs) (T 213).

On cross-examination the witness testified that the standard option in the insurance policy permitted an insured to recover actual cash value (replacement cost less depreciation [T 220-221]). In a partial loss case, depreciation is still considered (T 226) in determining damage sustained.

DAVID H. DEITSCH, an attorney specializing in representing insurance companies and over-the-road moving van companies, represented the insurance company whom the Petitioner sought to recover against.

Deitsch testified that during the course of the civil suit Petitioner testified he paid Lawrence Sheet Metal $1,248,000.00 to repair the warehouse roof (T 284). A total of $134,000.00 was paid to suppliers of materials with the balance paid to Lawrence Roofing (T 288). According to the witness the Petitioner testified at the civil trial that Herb Dennis was the principal of Lawrence Roofing with whom he entered into an agreement for the repairs.

On May 18, 1983, Rodolitz was deposed and asked about a Carl Medina, the payee on checks which were subpoenaed and stated that he did not know who he was (T 339). A series of checks in the amount of $800,000.00 payable to Bolla Supply were paid for supplies which were used to repair the roof (T 340). Bolla Supply was owned by Robert Smith and Seymour Blutstein.

Deitsch conceded that the state court civil suit sought $1,248,000.00 as the value of damages and not for what was

actually expended (T 361). Although the carrier established a reserve of $250,000.00, its initial settlement offer was only $30,000.00 (T 371). During the course of the Petitioner's testimony during the civil trial, he explained that Lawrence Roofing was structured the way it was at the request of the European American Bank and its officers (T 396).

Deitsch claimed that Rodolitz offered evidence to establish his expenditure of $1,248,000.00 without factoring in depreciation, and that at no time during the civil trial did Mr. Rodolitz contend that he did the repair work himself (T 430).

Deitsch conceded that an insured could collect "actual cash value" even without making the repairs, or in the alternative receive a settlement and repair the damage for less than the figure received, without having to return any difference (T 436).

SEYMOUR BLUTSTEIN, a bowling alley magnate testified that he first met the Petitioner in the early 1960's when the Petitioner was building a bowling center for a company he worked for. Over the years, he and the Petitioner became friends.

In 1976, Rodolitz told Blutstein he was experiencing temporary financial difficulties caused by the collapse of the Franklin National Bank. Late in December, 1976, Petitioner asked him to open a bank account at the Midlantic Bank in New Jersey for the Bolla Supply Company and gave him a check with which to open the account.

He went to the bank, but was unable to open the account without a certificate of doing business. On December 23, he and the Petitioner obtained the certificate and he opened the account. Thereafter, Blutstein received checks to deposit, and was told what checks to write (T 456).

Blutstein did not sell building supplies to the Petitioner, Lawrence Roofing or Tubular Products, nor did he buy any items from the Petitioner or his companies. In June, 1981, the Petitioner spoke to him requesting he advise Midlantic that there may be

inquiry into the Bolla account and not to release any information Blutstein did so.

In 1982, Mr. Rodolitz spoke to him about Bob Smith a former manager at one of his bowling centers who had died. Rodolitz stated that he needed to use his name as a person who ran Bolla Supply (T 470). It was agreed that Rodolitz would claim that Smith received building supplies on consignment to sell, but that something happened which required him to purchase them from Smith leaving him with a small profit (T 482).

Later, Petitioner told him he may be subpoenaed by the insurance company for the trial and should give this account if asked. Petitioner confided to Blutstein that he had actually used supplies that he had accumulated over the years, but needed Bolla to get the proper value of the supplies for the insurance company.

In May, 1983, the Petitioner spoke with him about a potential Federal Grand Jury investigation and asked him to tell the Bob Smith story. Blutstein agreed (T 488), but told him he would need an attorney. Petitioner responded that one would cost around $20,000.00. Blutstein remarked he could not afford that much, but Petitioner didn't respond (T 489).

In June following a telephone call from the U.S. Attorney's Office he called the Petitioner and told him he received two subpoenas. One for Bolla Supply's books and records and one for him personally. Rodolitz expressed the hope he would relate the "Bob Smith" story (T 490).

Mr. Rodolitz showed him his deposition relating the Smith story and information regarding Bolla Supply checks (T 491) and gave him a certificate of doing business for Bolla and a certificate of incorporation for Sanitary Shoe. Blutstein told Petitioner that he had retained an attorney who was meeting with the U.S. Attorney. Blutstein said that he would be telling the truth. Petitioner visibly angry stormed out of the meeting.

At a later meeting, the topic again arose, as well as the fact that he would be receiving immunity. Rodolitz remarked that

immunity wouldn't protect him from other agencies. Blutstein said he would have to "do what he would have to do" to protect himself (T 499). Subsequent thereto he met with his attorney and the prosecutor and entered into a cooperation agreement.

When questioned about a conversation he allegedly had in 1978 with a John Kelly regarding building materials that the Petitioner had available to use in constructing a bowling center, Blutstein denied ever having the conversation (T 563). He admitted that the Petitioner told him he had materials available, but claimed the conversation was later in 1982 or 1983 (T 564). At that time, Petitioner indicated that supplies which were used to repair the Alexander roof were supplies that were on hand (T 565). When pressed, Blutstein stated that his conversation concerning the availability of building supplies took place prior to 1981, but he could not determine the exact year (T 568).

During his conversations with Mr. Rodolitz he learned that the materials used on the roof repair were originally his own and that he never claimed to have used materials which in fact were not used (T 575-6). The reason for using Bolla was because the Petitioner believed that the insurance company would resist paying the full value of the materials used (T 579-80).

When Petitioner asked him to open the Bolla account he readily agreed to do so. In addition, when a certificate of doing business was needed he accompanied Petitioner to the Bergen County Clerk's Office in Hackensack on December 23 and obtained it (T 640-1).

He told the Petitioner that he hired a lawyer who was negotiating a deal with the Government that he not be prosecuted for his criminal involvement (T 672-3). He further told him he was seeking immunity and would not relate the "Bob Smith" story.

Blutstein testified that he told the Petitioner that he was willing to tell a false story to a Grand Jury prior to his learning that he would be granted immunity in May, 1983. Blutstein learned from Petitioner that there was a possibility that a Federal Grand

Jury might be investigating Bolla Supply at which time he told the Petitioner that if called he would tell the Bob Smith story (T 685-6).

JOSEPH CLARKE, a roofing contractor with New York Roofing since 1936 testified that in 1972, he went to the warehouse and examined the roof for leaks. He observed a smooth surface insulated roof over metal decking. This type of roof has a normal useful life of ten plus years. The roof was not a new roof and had pending problems as well as a split in the roofing membrane (T 721).

In 1975, he submitted a budget proposal to Alexanders to reroof the building. This plan involved removing the existing materials down to the metal deck, applying a new insulation board and mechanically fastening it to the deck. His estimate then was $750,000.00. In 1979, he again submitted an estimate to reroof the building. This estimate amounted to $1,150,000.00, but the price did not include removing and replacing the metal deck (T 728-9).

When shown the Lawrence Roofing contract concerning replacing the same roof he stated that a difference existed because Lawrence was not removing and replacing the insulation and was proposing using one less layer of asbestos felt. If he had submitted an estimate for repairing or replacing the roof in 1976 his estimate would have been approximately $690,000.00 which would also include his profit (T 736).

Clarke stated that he had testified at the civil trial for the carrier but nonetheless the jury found a value in excess of his estimate (T 742). He also stated that recently bids were let for the replacement of the roof by various companies. There was a spread of $800,000.00 between the lowest and highest bidders, thus acknowledging the variances that frequently occur in the business (T 752).

Between 1975 and 1979, he did not see the roof and never personally observed the damages caused by the 1976 windstorm. He

acknowledged that his 1975 estimate of $750,000.00 did not include the 10-15% extra that would be charged for a winter replacement (T 757) and that with increased labor costs an estimate in 1976 could have been in the area of $900 - 950,000.00 (T 761-2). In addition, a variance between $950,000.00 and $1,200,000.00 would not be unreasonable between different contractors (T 762-3).

HERBERT SMILOWITZ, the president of Allied Roofing Supply testified that he received orders from Gary Rodolitz for roofing material, insulation and asbestos felt (T 816) which were delivered to the job site from New Jersey. Upon reviewing the invoices for materials supplied the witness stated that they were insufficient to repair the size roof in question. The witness further stated that based upon a 400,000 square foot roofing job and costs as they existed in 1976 - 1977 the cost for materials would have been $153,700.00 with a possible addition of $10,000.00 for gravel steps and flashings (T 826), and that he was unaware of any supply house that would have charged $864,260.20 for roofing materials (T 829).

On cross-examination the witness testified that he never saw the roof in question, did not know if it was repaired, or whether or not the material ordered from him was used for that roof (T 839-840). In addition, he could not state how much material the insured ordered from him, its cost or how much he was paid. In fact, when he testified from invoices shown to him by the Government he only could testify regarding those shown without knowing if those were all the invoices involved (T 841-842).

The witness acknowledged that his stated costs would be greater if they involved temporary winter repairs prior to the final repairs in the Spring (T 843) and that labor costs escalate dramatically if the entire roof is not repaired at one time (T 863).

DAVID CLARK, the F.B.I. case agent assigned to the instant matter testified about a flow chart which was prepared which showed $40,110.20 in Tubular Supply checks drawn to Bolla Supply noting that Abraham and Jerald Rodolitz were the signatories. The chart also showed Lawrence Roofing checks in the amount

of $824,250.00 made payable to Bolla Supply, and that a Bolla Supply check for $269,500.00 was deposited by Zeroy Industrial on January 12, 1978. Bolla paid out $620,021.54 between June 6, 1977 and April 17, 1978 leaving its account with a zero balance at that time. The Zeroy account showed a transfer or debit memo to the Petitioner in the amount of $45,000.00 with Jerald Rodolitz being the signatory for the Zeroy account. A total amount of $725,510.00 was transferred to the A.J. Rodolitz Special Account (T 879).

Clarke conceded that Zeroy existed as early as February, 1976 with checks being deposited in its account in the amounts of $10,000.00 and $43,050.00 thereafter (T 882-3). The Bolla account was opened on December 23, 1976, but he only produced in court checks and statements from June 6, 1977.

THE GOVERNMENT RESTS

Pursuant to Rule 29 defense counsel moved for a dismissal of the charges. Judge Sprizzo granted this motion only to the extent of dismissing the conspiracy count (T 913).

THE DEFENSE CASE

ROBERT J. CAMPBELL, a senior engineer for Wyeth Laboratories with 39 years of experience, testified that in 1972 while employed by Coca Cola he met the Petitioner who was building a warehouse for them. During 1972 and up until closing in 1974 he observed building materials being stored in and around the building (T 952-3). In 1974 he remembered that Mr. Rodolitz had left over and stored at the warehouse a large quantity of roofing material (T 954), which occupied about one-half of the building.

In January, 1975 he went to the Alexander warehouse roof after the Petitioner had asked him if he knew of anyone who could perform uplift tests.* He observed areas near the smoke hatches

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* These tests determine the roof's wind resistance.

which he felt posed a future problem, but felt that the roof was generally in good condition.

In October, 1976 some two days after the windstorm he went to the warehouse and observed a badly damaged roof (T 965). He conducted lift tests with a dozen plugs being taken. The tests indicated that the integrity of the entire roof had been lost and had to be replaced (T 977). Testifying as an expert he opined that the cost of repairing the roof in 1976 would have exceded $3.00 per square foot (T 982). The total cost of the roofing repairs would be approximately $1,200,000.00 in 1976 (T 992).

When he saw the roof in 1975 it was in generally good condition for a roof that was 10 years old. The roof had a useful life of 15 to 20 years. While on the roof he noticed problems with leaks around hatch covers as well as inadequate flashing and improper hatch base construction.

VINCENT ROY CACCIATORE, a Freeport, New York attorney testified that on December 23, 1976 he met with the Petitioner around lunchtime. Rodolitz came to his office unannounced about 12:30 P.M. to discuss a matter. They had lunch and returned to his Freeport office about 1:30 P.M.

JOHN KELLY, testified that he has been in the pile driving and heavy foundation business for some 60 years and has known the Petitioner since 1966.

In mid 1977, he spoke with Blutstein concerning building materials. He had similar discussions in 1978 at the Meserole bowling alley and later at the Oakdale, Long Island alley. At the 1978 meeting when he asked him if he had any material available, Blutstein told him he had steel, bar joists, roofing material and tar paper from the Alexanders job, but was going to use it himself (T 1154).

On cross-examination he testified that the Petitioner had purchased about $50-60,000.00 in construction equipment from him. Prior to leaving a job that they worked on in 1975 he inventoried

materials which were left over, including structural steel, bar joists and metal decking as well as insulation and tar paper (T 1163) totaling about 100,000 square feet of material (T 1167).

ROBERT KENNETH SMITH, testified that he met Blutstein in 1973-1974 when his father managed a bowling alley for him and that he was paid four - five hundred dollars a week in cash. In 1976 he began working for Mr. Blutstein, likewise being paid in cash. In the summer of 1978, Mr. Blutstein was going to buy a bowling alley called Jib Lanes in Queens with his father.

After his father died in 1979, he spoke with Mr. Blutstein about his interest in Jib Lanes and the 10% that was his family's. Blutstein denied there was a viable agreement and said he would return the $10,000.00 to Smith's mother (T 1188).

In 1976, he was associated with the building material business in that he was to keep the invoices and the inventory for Bolla Supply (T 1189). The materials they worked with were the Petitioners which were given to his father on consignment who when materials were sold would pay the Petitioner (T 1190-1). When material was used from their inventory for the Alexanders loss he made the inventory deductions from the invoices his father or Blutstein brought him.

HERMAN J. KNOPH, a banker associated with European American Bank for 32 years, has known the Petitioner for 15-20 years as a customer of the bank and its predecessor Franklin National Bank. In 1976, he opened the Lawrence Roofing account at the direction of James Smith its then senior officer.

ROBERT A. SCHER, a New York attorney specializing in insurance testified he knew Petitioner for 15 years and was the original attorney involved in Petitioner's civil suit against the carrier. Late in 1976 he met with James Smith regarding Lawrence Roofing and advised the Petitioner to comply with the banks

request which was to control through the Petitioner what was going on with the roof repair.*

James Smith had previously been deposed on video tape during the civil litigation during which he stated that he insisted upon the structuring of Lawrence Roofing as it was for the reasons previously stated. At the civil trial the Petitioner testified about the structuring of Lawrence Roofing relating what Mr. Smith had indicated. The civil trial concerned itself with two elements of value in that both actual cash value of the loss or replacement cost would have been sufficient to make a recovery (T 1270).

He testified that the civil trial proceeded under both theories of recovery, actual cash value or replacement cost and that it would be erroneous to state that the judge at the civil trial did not submit both theories to the jury.

Under the policy, if an insured already has supplies on hand he is still entitled to the fair and reasonable value of that which he has (T 1314-15). When determining actual cash value depreciation is only one factor that should be taken into consideration (T 1322).

On redirect examination the witness stated that in a partial loss situation depreciation is not a factor to be considered because you can't buy used material. Therefore, when depreciation is discussed it involves a total loss situation rather than a partial loss such as this (T 1324).

BRUCE JACOBS, testified that he does roofing estimates as well as freelance roofing sales and that he has been in the business for over 35 years. In 1976-1977 he was employed by Mr. Smilowitz at Allied Roofers Supply Company.

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* This was done because they had a mortgage on the building due to the fact that they were servicing the accounts of the Franklin National Bank. The bank wanted to insure that the job was done and wanted to be sure that the Petitioner was involved (T 1260).

In 1976-1977 he, on behalf of Allied Roofers, sold the Petitioner a small portion of the roofing material needed for the Alexanders roof because he was advised that there was a stock pile on hand that would be used. In 1974 he sold the Petitioner enough supplies to do a roof that was approximately 400,000 square feet which was to be used on the Coca Cola project in the Bronx.

Uplift tests were conducted on the Alexander roof in 1975 and 1976 both of which found the roof to be satisfactory. The tests conducted after the windstorm convinced him that the roof had to be repaired. In his opinion the repairs to the roof would have cost between $3.00 and $3.25 per square foot in 1976 (T 1336).

REASONS FOR GRANTING THE WRIT

POINT ONE

THE TRIAL JUDGE'S ERRONEOUS CHARGE REGARDING THE INSURANCE LAW OF THE STATE OF NEW YORK PERMITTED THE PETITIONER TO BE CONVICTED ON AN INCORRECT THEORY OF LAW

The case began with an ill wind. On Saturday, October 9, 1976, a windstorm swept through the Bronx and wrecked the roof of a warehouse in the Oaks Point section. During the storm, the whole roof was "moving" and a third of it was lifted clean off its foundation.

The warehouse, Oak Point Industrial Park, was owned by the Petitioner, Abe Rodolitz, a 65-year-old self-made man, with warehouses and a construction business in various parts of the city. Oak Point was four city blocks square, and the roof measured 400,000 square feet. It was rented to Alexanders Department Stores and inside were millions of dollars worth of merchandise belonging to Alexanders. Winter was coming on, and if the roof was not repaired quickly the damage from the elements would surely be enormous. Rodolitz rapidly assembled the necessary materials, men and knowhow, and set about replacing the damaged roof, ultimately completing the project by the middle of February, 1977.

The building was insured by Massachusetts Bay Insurance Company. The policy, dating from 1973, insured the building for its actual cash value up to $3,800,000, and contained a rider – for an extra premium – which also allowed replacement cost coverage.

Petitioner computed the cost of repair at $1,248,000. The insurance company established a cash reserve of $250,000 for the repair, but offered Rodolitz only $30,000. This disparity led to a lawsuit in May, 1977. In Queens County Supreme Court, a jury found for Rodolitz, assessing the actual cash value and replacement cost of the roof, each at the $1.2 million figure. This verdict was delivered after a seven week trial at which experts for both sides testified as to the proper cost of repairs.

*Massachusetts Bay did not give up. After a post-verdict settle*ment conference called by the insurance company failed to produce an agreement, the case somehow came to the U.S. Attorney's Office for the Southern District. With the government now championing the insurance company's position that Rodolitz was not entitled to the insurance money which the jury awarded, Rodolitz was indicted for mail fraud, conspiracy and obstruction of justice.

From the outset, Judge Sprizzo wondered what this case was doing in the federal courts, and often expressed the opinion that it did not belong there, save perhaps for some technicality (T 342-3, 399, 920). Indeed, this case was out of its element in a federal court. Though questions of intent to defraud are familiar enough, issues relating to New York insurance law are another matter. And it was in just this respect that the trial court floundered.

In particular, since it was the government's claim that Rodolitz was trying to get more than he was entitled to from the insurance company, the question of just what he was entitled to become a paramount issue in this case. In this connection, one of the government witnesses (Clarke) testified that the effective lifetime of this type of roof was about 10 years (T 721), while another (Smilowitz) estimated it at 8 years (T 833-4). Another witness (Campbell) testified the useful life of such a roof was 15-20 years (T 1040-1), while the roof itself was 10 years old (T 1039).

In its charge, the judge told the jury, in part, that one measure of damages was actual cash value less depreciation. Thus, under this standard the jury could have found the actual cash value of the roof was Rodolitz' $1.2 million figure, less at least 50% for depreciation, or $600,000. It could then conclude that the defendant was trying to "rip off" the insurance company for the difference, $600,000. However, this standard, actual cash value less depreciation, is the wrong method of computation in this case—a partial loss case. It is only applicable where the entire building is destroyed. Though the partial loss cases were offered to the court below, the judge stated that he would not charge according to them because it might confuse the jury (T 1596). Actually, the court's charge confused the issue in the case. It allowed the jury to convict the defendant on an erroneous theory. We

submit, the judge should have charged according to the partial loss cases – where depreciation is not a factor, and not according to total loss cases, where it is. Thus, if the jury found the value of the roof to be $1.2 million, as the civil case jury did in Queens County, it should not have been allowed to find the value depreciated by the age of the roof, and then use the difference as a measure of fraud. The possibility that the verdict was based on this error renders it reversible.

The Applicable New York Insurance Law

In New York, the standards measuring recovery for damages under an insurance policy vary, depending on whether the loss is total or partial. Where a total loss is involved, the factor of depreciation comes into play where the building is insured for its actual cash value. *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176 (1928). Where a partial loss takes place, however, depreciation is not a factor in New York.

"Only a partial loss results where the building is not so damaged that its identity or specific character is destroyed." Appleman, Insurance Law & Practice, vol. 6, Sect. 3861, p. 281. Under this standard and common sense, the damage to the roof of the warehouse in this case was only a partial loss, since the building itself was not destroyed.

Andrews v. Empire Cooperative Fire Ins. Co., 103 N.Y.S. 2d 177, 182 (Cayuga Co. 1951), stated the general rule that in partial loss cases the measure of damage is the difference in value before the fire and immediately after it. Also see, *Molot v. Commonwealth Ins. Co. of N.Y.*, 10 A.D.2d 683 (1st Dept. 1960); Appleman, *supra*. In assessing this, the plaintiff in *Andrews* argued that he was entitled to be compensated for the value of new replacement material. The defendant claimed that the new material must be depreciated because the material it replaced in the house had depreciated prior to the fire. *Andrews* held that replacement with "material of like kind and quality" referred to the type of material used, and not its value diminished over time.

> "The words 'kind and quality' connote to me the type of material, i.e.: whether brick, stone, wood, etc., and grade or class of material as formerly used in the building. *It does not mean depreciated material.*" [*Andrews*, 103 N.Y.S.2d at 182, *supra*, emphasis added].

At the time of *Andrews* there were – as there still are – two views on the matter: the "majority view", which holds depreciation should be considered, and the "minority view", adopted in *Andrews*, which holds depreciation should not be taken into account in partial loss cases. See, Valuation under Fire Insurance Policies, 40 Col.L.Rev.818, 826 (1949); Anno.: Depreciation as a Factor in Determining Actual Cash Value for Partial Loss Under Insurance Policies, 8 A.L.R.4th 533. Subsequently, other courts in New York have reaffirmed adherence to the "minority view."

In *Lazaroff v. Northwestern Nat. Ins. Co.*, 121 N.Y.S.2d 122 (Sup.Ct.N.Y.Co.1952), the court wrote:

> "The coverage provided for is 'to the extent of the actual cash value of the property . . . not exceeding an amount which it would cost to repair or replace the property with material of like kind and quality . . .'. The court is of the opinion that the defendant's obligation in respect to repairs is to reimburse the plaintiff for the cost of repairs with materials of the kind and quality damaged *without deduction for depreciation.*" Boskowitz v. Continental Ins. Co., 175 App. Div. 18; Andrews v. Empire Cooperative Fire Ins.Co., 103 N.Y.S.2d 177 (emphasis added).

Lazaroff was affirmed in the Appellate Division, 281 App.Div. 672 (1st Dept. 1952), and leave to appeal was denied in the Court of Appeals, 305 N.Y. 930 (1953).

The reason for disallowing depreciation in partial loss cases is easy to understand. By including depreciation, an insurance settlement would often be insufficient to complete repairs. The homeowner, for instance, who loses a room to a fire, is not placed in the same position as he was before the fire if he must replace

it with new flooring or window panes, but receives only a depreciated amount for the cost of the materials. He cannot buy depreciated wood or glass on the market. While the new wood and glass will in theory last longer than the old, it cannot outlive the house as a whole. See, Insurance Law Journal, Jan. 1956, 34, at 35. The other view, of course, sees compensation for new materials to replace old ones as a sort of profit for the insured. Since one or the other of the two positions must be chosen, in essence the courts of a state choose to give the benefit either to the insured or to the insurance companies. In *Andrews* and *Lazaroff*, New York favored the victim; a wholly reasonable result.

While the holdings of *Andrews* and *Lazaroff* are unequivocal, some degree of confusion entered New York law because of the decision in *Gervant v. New England Fire Ins. Co.*, 306 N.Y. 393 (1954). *Gervant* did not address itself to the issue of whether depreciation should or should not be deducted in partial loss cases. In *Gervant*, the appraisers had assessed recovery at actual cash value less depreciation, but arbitrarily refused to admit evidence of other factors bearing on actual cash value, such as the original cost and reproduction cost, expert opinion on value, the gainful use to which the building might have been put, etc. The Court of Appeals held that the refusal to broaden the scope of inquiry was wrong. Though *Gervant* was a partial loss case, neither party questioned the propriety of deducting depreciation. This was probably because the policy in issue contained a coinsurance clause limiting liability to 80% of actual cash value; in other words, depreciation was built in. The present policy contains no such limitation. Thus, though *Gervant* is a partial loss case where depreciation was deducted, it cannot be said to overrule *Lazaroff* by implication, and learned analysis has not reached such an interpretation. See, the Factor of Replacement Cost in Fire Insurance, Insurance Law Journal, Jan. 1956, 34. Also see, New York Pattern Jury Instructions, PJI 4:49, at p. 977. *Andrews*, *Lazaroff* and the "minority rule" are still the law in New York.

Moreover, to the extent that the issue of depreciation in partial loss cases is clouded by *Gervant*, the court below in this case did not apprise the jury of it. It simply treated *Andrews* and *Lazaroff* as if they did not exist. This is particularly inappropriate

in a criminal case where the issue of the defendant's belief about what he can recover influences the question of fraudulent intent. Indeed, since the theory of defense was that there was no intent to defraud, it is incumbent upon the court to inform the jury of an existing legal basis for Rodolitz' good faith belief that he had a valid claim, especially since he pursued his claim with the guidance of lawyers and banks. In other words, we submit Rodolitz cannot be found a criminal if he relied in good faith on one interpretation of the law. The jury at least must be made aware of the conflicting theories in order to assess whether the defendant had a good faith basis for pursuing his claim.

The Charge Below

Because the partial loss in this case should not have taken into consideration any depreciation, the court below clearly erred by charging the jury along the lines of total loss cases, where actual cash value less depreciation is an appropriate measure. This error infected the jury's verdict to an enormous extent, since it allowed them to deduct up to 50% (the difference between the longest estimate of the useful life of the roof and its age) from the value of the roof in assessing whether the defendant was intending to get more than he was entitled to from the insurance company. In other words, by applying the charge the court gave, instead of the charge the court should have given, the jury was allowed to find criminal conduct where non existed: to find a "rip off" where the insurance law of New York allows recovery.

Indeed, this possibility was all the more likely because of the details of how the price for the roof and materials to repair it was established. At the trial, the government claimed that the companies from which Rodolitz purchased the materials were a sham, and that the money he paid to these companies eventually came back to him. But even if this is true, the defendant nevertheless repaired the roof with materials of value, and the real question, as far as intent to defraud is concerned, is not whether deceit was used in documenting the price, but whether the amount asked of the insurance company was in fact fair and reasonable.

In *United States v. Regents Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), the Court considered a mail fraud case where stationary supplies were sold over the telephone. The "sales pitch" deceitfully represented the manner in which the defendant had acquired its merchandise, as well as the way in which the customer had been referred to the company. This was supposed to convince the customer that there was a good reason for the lower prices offered. However, there was no fraud regarding either the quality of the merchandise or its price. Though the customers had been deceived, they had not been defrauded. Nor was the defendant trying to get "something for nothing" or contemplating any injury to the customers.

> "The Regent-Oxford agents did not attempt to deceive their prospective customers with respect to the bargain they were offering; rather, they gave a false reason for being able to offer the bargain . . . The government asks us to infer some injury from the mere fact of the falseness of the representations and their connection with a commercial transaction. On the evidence before us, consisting principally of the stipulated falsehoods and the testimony of the defendant's president, we conclude that the defendants intended to deceive their customers but they did not intend to defraud them, because the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception." [421 F.2d at 1182, *supra*].

In like manner, any attempt by the defendant in the present case to deceive the insurance company about the source of the repair materials does not mean he intended to defraud. If Rodolitz was only trying to get just compensation for the materials he used in repairing the roof, if he was not trying to get "something for nothing", then there was no fraud. Indeed, that was his position at trial. But the court's charge allowed the jury to find the opposite by erroneously deducting depreciation from the value of the roof. It gave the jury the opportunity to find the "something

for nothing" by concluding a depreciated roof was worth $600,000 less than a non-depreciated roof. In other words, it allowed the jury to find facts which established an intent to defraud, whereas the correct charge would have barred the door to such a finding.

In this connection, the government may argue that the jury could have found an intent to defraud by crediting other aspects of the government's case. For instance, the jury could have believed the $1.2 million figure was itself fraudulent. This was a matter of major controversy at the trial, as it was in the civil case, with experts for both sides disagreeing about the cost of materials and repairs, although all admitted that rather wide parameters for repairing a roof could legitimately exist in the construction business. Which experts the jury believe is simply not known, although the jury in the civil case credited the experts who testified for Rodolitz.

Nevertheless, the fact that the jury could hve taken a different route to its verdict is not the issue, because it is not known how the jury went about deciding the case. Where two theories are submitted to a jury, one of which is incorrect, a general verdict must be reversed even though the jury was properly instructed on the alternate theory. As this Court has succinctly put it: "The proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected". *Yates v. California*, 354 U.S. 298, 311-12 (1957); *Williams v. North Carolina*, 283 U.S. 359, 368 (1931); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

The Second Circuits decision chose to ignore the clear and harmful error regarding the charge, determining that once sufficiency was established, there could not be prejudice to the Petitioner because of the charge and therefore did not reach its validity.

While Petitioner argued that he only sought from the insurance company that which he was legally entitled to, the Circuit found that the Government need not prove that he recovered more than he was entitled to, but that he "employed a deceptive scheme intending to prevent the insurer from determining for itself fair

value of recovery" (8)*. In determining such, the Court erroneously found that Mr. Rodolitz hatched a fraudulent scheme (7) which gave the jury ample grounds to find that he participated in this scheme to successfully recover more than he was lawfully due (7-8).

The Circuit compounded this error by misinterpreting the facts in finding that "he (Rodolitz) admitted to using circuitous and deceptive means in calculating the cost and manner of repair" (O18). This error led the panel to conclude that such an admission would lead to "a virtually inescapable conclusion that Mr. Rodolitz intended to defraud the insurance company . . ." With the panel starting with this premise, it is understandable how they then ignored the charge, deeming it harmless and not prejudicial and affirming the conviction.

A reading of the trial transcript clearly establishes that at no time did Mr. Rodolitz ever admit to or acknowledge that he was using a fraudulent scheme in his quest for reimbursement of his loss. To the contrary, a fair reading of the transcript in conjunction with a proper understanding of New York Insurance law on the subject would lead to a virtually inescapable conclusion that Mr. Rodolitz did not intend to defraud the insurance company and only sought that to which he was legally entitled. It should be noted at this juncture that testimony elicited during the trial indicated that the establishment of the companies by Rodolitz (the scheme), was not just done at his whim alone, but was done at the suggestion of the bank involved.

If the theory adopted by the Circuit is correct, then the charge, if erroneous as asserted, is critical and not harmless. The alleged scheme only becomes fraudulent once it is determined that the accused sought more than he was lawfully entitled to. If the jury was correctly charged under New York Insurance Law, it

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* Numerals in parenthesis refer to pages of the panel's decision dated March 17, 1986.

would have found, contrary to what the Circuit alleged, that the "scheme" employed *did not* prevent the insurer from determining for itself fair value of recovery. All that this matter involved were two parties with different contentions which properly belonged before a civil jury.

The insurance company, in fact, determined for itself what it believed was fair value of recovery independent of anything Mr. Rodolitz did. They did not rely upon information supplied by Mr. Rodolitz in determining what *it* believed the valuation of the roof was, but relied upon facts and figures supplied to it by the experts they employed to determine valuation. The insurance company, even with the use of its own experts, initially offered Mr. Rodolitz less than what a fair value was for the damage eventually negotiating up to a figure that was not so far from that sought by Mr. Rodolitz. This "good faith hăndling" is no more illegal than the "scheme" that Mr. Rodolitz engaged in to secure that which he believed he was entitled to.

Therefore, it is reasonable to conclude that the Petitioner did not engage in conduct with the specific criminal intent necessary to establish a mail fraud (See *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508 [1896]; *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 [2d Cir. 1970]; *United States v. Von Barta*, 635 F.2d 999, 1005 [2d Cir. 1980]).

In short, the reasons given by the Circuit for its determination not to consider the Court's charge do not in fact support its decision. If in fact the charge was erroneous as argued, the Petitioner's right to a fair trial was infringed upon. Therefore, the convictions concerning the mail fraud counts must be reversed and a new trial ordered.

POINT TWO

THE EVIDENCE AT TRIAL WAS LEGALLY INSUFFICIENT TO ESTABLISH THAT THE PETITIONER TAMPERED WITH A WITNESS AS CONTEMPLATED BY 18 U.S.C. SECTION 1512

Count Six of the indictment charged Petitioner with violating 18 U.S.C. 1512 by engaging in "misleading conduct" in an effort to influence the testimony of Seymour Blutstein, by asking him to tell the "Bob Smith" story if later subpoenaed to testify before the Grand Jury (T 488-490). Later, after receiving a Grand Jury subpoena Petitioner gave Blutstein a portion of his deposition which was taken in the civil case wherein he related his account of purchasing materials from the late Bob Smith (T 491). He also gave him the certificate of doing business for Bolla Supply, and the certificate of incorporation for Sanitary Shoe Co., an aborted venture of Smith's (T 495).

Under that portion of Judge Sprizzo's charge to the jury relating to Count Six (T 1584-7) the jury was told that it must find, beyond a reasonable doubt, that Petitioner engaged in misleading conduct in connection with Blutstein's anticipated Grand Jury testimony. Whatever else may be said of Petitioner's conduct we dispute that it constituted misleading conduct within the purview of Section 1512 in light of Blutstein's knowledge that the deposition was false (T 701).

The Second Circuit recently had occasion to discuss the reach of Section 1512 in *United States v. King*, 762 F.2d 232 (2nd Cir. 1985) in the context of defendant King's attempt to tamper with a witness, Orgovan. Since the evidence at the trial before Judge Elfvin demonstrated that Orgovan could not and was not misled by King's statements to him, the conduct did not rise to a violation of Section 1512. The fact that the intent was to mislead the government was not important: the statute requires the witness to be misled.

In the case at bar, Rodolitz' statements to Blutstein were directly analagous to those in *King*. Blutstein, according to his own

testimony, was not misled by what Rodolitz related because the witness well knew the truth about Bolla Supply, having been intimately involved in Bolla's establishment and its activities through the late Bob Smith. In light of the Circuit's construction of Section 1512, insofar as the basis of the alleged tampering is misleading conduct, the subject of the tampering could not have been misled. For this reason, the conviction under Count Six must be reversed and a new trial ordered.

Furthermore, if the court's charge on the insurance law of New York was erroneous, as contended in Point I, *supra*, then the obstruction count in this case must necessarily fall with it. The reason for this is clear. In its charge, the court told the jury:

> "The alleged misleading conduct which was directed toward Mr. Blutstein consisted in misrepresentations made to him about the fact that he was only trying to get what he was entitled to get, that he had materials on hand, et cetera. That is the government's theory." (T 1586)

Thus, if Rodolitz was in fact only trying to get what he thought he was entitled to there would be no misleading by the petitioner. But, as we argued in Point I, the court's charge on insurance law, by erroneously allowing the jury to deduct depreciation in a partial loss case, prevented the jury from finding that Rodolitz was entitled to the recovery which the partial loss cases would allow. In other words, if the charge had been correct on the insurance law, the jury could have found that Rodolitz was entitled to what he claimed, thus making his statement to Blutstein not misleading at all. Conversely, because the jury was led by an erroneous charge to conclude Rodolitz was not entitled to what he claimed (when depreciation was deducted), they must necessarily have found the statement to Blutstein was misleading as well.

While the Second Circuit stated that it was a close question as to whether or not the evidence was legally sufficient to sustain the charge of tampering with a witness it held that it was. This task was difficult because of its recent holding in *United States v. King, (supra)*, but the court was able to distinguish the instant case due to a misinterpretation of the facts.

The crime in this situation, according to the Circuit, was not asking the witness to tell a story that he knew was false, but was in making a false statement to him to convince him to tell the story.

The Circuit found that the "false" statement that Mr. Rodolitz made was that he was seeking proper value, meaning the full insurance proceeds to which he was lawfully entitled. Here, as in the first point relating to mail fraud, the Court stated that:

> "The evidence introduced at trial demonstrates such a statement to be clearly false. Therefore, the jury had ample evidence upon which to find that Defendant's statement constituted misleading conduct." (12)

Once again, the Circuit sought to establish the falsity of the statement by ignoring facts which would tend to prove otherwise. An accurate charge on New York Insurance Law would establish that Mr. Rodolitz was seeking proper value and was acting without intent to defraud anyone or to mislead the witness. The Circuit, choosing to ignore the validity of the charge, made an assumption of falsity that a valid charge would have negated.

The jury, in determining the guilt or innocence of Mr. Rodolitz, did not know the law as the Circuit has interpreted it to be and had to make a determination of falsity based upon a mischarge. In essence, what the Court did was direct a verdict by telling the jurors that Mr. Rodolitz was seeking to recoup more than what the law would require the insurance company to pay.

The misinterpretation of the law was compounded by the Circuits misinterpretation of the facts as indicated in the argument of Point One. By misinterpreting the facts and not applying the law, the Circuit left the door open to broaden the *King* (supra) decision and find the actions of the Petitioner in violation of the statute.

For all the reasons stated, the conviction charging a violation of Title if U.S.C. Section 1512 must be reversed and dismissed, and a new trial ordered as to the remaining counts in the indictment.

POINT THREE

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH MAIL FRAUD

In the Autumn of 1976 the roof of a Bronx warehouse that Petitioner owned sustained substantial damage from a savage windstorm. After numerous attempts to collect under the terms of his policy Rodolitz successfully sued the carrier in State Court and recovered a $1.2 million dollar verdict. The trial in the case at bar presents, we respectfully submit, a new and unprecedented foray by the United States Attorney's Office into commerical practices between carriers and their clients enmeshed in claim disputes.

The proof at trial established that experts substantially differed as to the value of damage caused and costs of repairs to Rodolitz' roof. Whether Rodolitz' experts were correct or not, we dispute whether under the particular facts of this case, that such variances between damage estimates can support a successful mail fraud prosecution. Simply put, construction and repair estimates traditionally vary subject to a multitude of variables inherent both in the industry and the estimate process itself.

A vital element of any mail fraud prosecution is proof that the defendant engaged in conduct with the specific criminal intent. (See *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508 [1896]; *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 [2nd Cir. 1970]; *United States v. Von Barta*, 635 F.2d 999, 1005 [2nd Cir. 1980]. Put another way, even if Petitioner's estimate was high, absent proof that he acts with criminal intent, there could be no mail fraud.

In addition, even when a defendant concededly utilizes less than candid methods or makes false or misleading representations during the course of negotiations, this alone does not rise to the level of mail fraud absent proof that actual harm was intended by the alleged scheme (*United States v. Regent Office Supply Co.*, (Supra at 1174, 1180-1181).

We respectfully submit that while the circuitous nature of Rodolitz' purchases of materials may have created the impression that the purchases were made at "arms length", even this proof establishes nothing more than the salesman-like puffing in the Regent Office Supply case, particularly when one considers that Rodolitz was told that this was required after European-American Bank took over the mortgage on his Oak Point warehouse.

There simply is no proof in this record from which one can find an intent to defraud. So long as the rider on the fire policy permitted recovery for the loss sustained, it is of no moment legally that circuitous or deceptive means were employed relative to the manner and cost of repair. So long as Petitioner could validly claim the amount awarded by the Queens County jury based upon valuation of loss sustained it would be anomolous and legally unwarranted to permit a successful mail fraud prosecution based upon lack of candor relating to the manner of repair.

Indeed, it is a particularly disturbing feature of this case that, on the one hand, one government expert conceded legitimate variances in estimates for such a roof would amount to $800,000 (T 752), while on the other hand, the government seeks to brand Rodolitz a criminal because his estimate figure varies by a lesser amount from their estimate.

Accordingly, since the value of the damage actually sustained was not false or fraudulent, but rather was claimed in good faith, the mere reliance upon or use of deceptive measures in the context of the repair process does not provide the basis to sustain a conviction for mail fraud.* Therefore the convictions for mail fraud must be reversed and dismissed.

CONCLUSION

For the reasons stated, we respectfully pray that a writ issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JEFFREY A. RABIN
Attorney for Petitioner

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* The law is of course clear that proof of actual harm is not required. (*United States v. Andreadis*, 366 F.2d 423, 431 [2nd Cir. 1966])

APPENDIX

APPENDIX A

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1448—August Term, 1985

(Argued August 13, 1985 Decided March 17, 1986)

Docket No. 85-1112

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ABRAHAM J. RODOLITZ,

Defendant-Appellant.

Before:

NEWMAN and WINTER, *Circuit Judges,*
and COFFRIN, *Chief District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, after a jury trial before John E. Sprizzo, *Judge*, convicting defendant

* Of the United States District Court for the District of Vermont, sitting by designation.

of three counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of tampering with a witness in violation of 18 U.S.C. § 1512.

Affirmed.

RICHARD A. STANLEY, Special Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Stuart E. Abrams, Assistant United States Attorney, on the brief), *for Appellee.*

JEFFREY A. RABIN, Brooklyn, New York, *for Appellant.*

COFFRIN, *District Judge*:

Defendant Abraham J. Rodolitz appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (John E. Sprizzo, Judge) on March 27, 1985. The jury convicted Rodolitz of three counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of tampering with a witness in violation of 18 U.S.C. § 1512. The case arises out of defendant's allegedly fraudulent scheme to conceal from the Massachusetts Bay Insurance Company his involvement in the repair of a damaged roof on one of his own buildings. In addition, the defendant allegedly attempted to persuade a witness to lie before a federal grand jury.

On appeal, Rodolitz contends, *inter alia*, that the government presented insufficient evidence to establish either mail fraud or tampering with a witness. He also alleges that assorted trial defects constitute reversible error. For the reasons stated below, we affirm both convictions.

I. BACKGROUND

In late 1976, a windstorm damaged the roof of a commercial building owned by Oak Point Industrial Park, Inc. ("Oak Point"). Rodolitz owned Oak Point and, through the Massachusetts Bay Insurance Company, had insured the building against damage.

After the building was damaged, Rodolitz initiated a fraudulent plan designed to inflate the recovery of the claim against the insurance company. To accomplish this, either Rodolitz or one of his associates set up bank accounts in the name of one of several business entities. These businesses include Bolla Supply Company ("Bolla Supply"), Lawrence Roofing and Sheet Metal Company ("Lawrence Roofing"), and Tubular Products Manufacturing Company. Rodolitz also maintained an account in the name of Zeroy Industrial and Distribution Corporation ("Zeroy") which became active in this plan. Rodolitz, himself or through his associates, transferred funds between these corporations in an effort to create an appearance of legitimate transactions in roofing supplies and services between the businesses. According to the documents evincing the purported transactions, Rodolitz hired Lawrence Roofing and Zeroy to repair the roof on the Oak Point building. Lawrence Roofing and Zeroy then purportedly purchased from Bolla Supply the supplies necessary to perform the job. In fact, Rodolitz

owned or controlled all the businesses and merely transferred money, materials and services between different branches of those businesses to give the illusion of arm's length transactions.

After using this method to establish a paper trail, Rodolitz filed a claim with the Massachusetts Bay Insurance Company for the $1,248,000 he asserts he expended in repairing the roof. He did not, however, reveal his connection to the companies purportedly involved in the repair. After the insurance company declined to pay the claimed amount, Oak Point sued the company in a New York state court and received a jury verdict of $1,226,241.39.[1] At no point, however, did Rodolitz reveal to the jury in that case that all money expended on the repair eventually returned to him.

During the course of the civil suit against the insurance company, Rodolitz caused the mails to be used on three separate occasions to further his attempt to recover the $1,248,000 from the insurance company.

After Rodolitz learned that a federal grand jury was investigating his activities in connection with his claim under the insurance policy, he attempted to persuade one Seymour Blutstein to lie in certain significant respects about Bolla Supply. At Rodolitz's request, Blutstein had fronted for Bolla Supply. He opened a bank account indicating through the Certificate of Doing Business that he was engaged in dealing in building material and supplies under that trade name. He deposited checks furnished by Rodolitz in the account and made with-

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1 The trial judge set aside the jury's finding that Rodolitz expended $1,226,241.39 in repairing the roof. Both parties took an appeal from the order which is presently pending.

drawals, as Rodolitz directed, to other payee business entities created by Rodolitz. Blutstein, granted immunity by the government, eventually refused to tell the story which Rodolitz had requested even though initially he had advised Rodolitz he would do so.

II. DISCUSSION

Rodolitz claims on appeal that the government offered insufficient evidence as a matter of law to convict him of mail fraud in violation of 18 U.S.C. § 1341, or of witness tampering in violation of 18 U.S.C. § 1512. It is well established that the reviewing court must sustain the jury verdict in a criminal case if, "viewing the evidence in the light most favorable to the Government, any rational trier of facts could have found the defendant guilty beyond a reasonable doubt." *United States v. LeRoy*, 687 F.2d 610, 616 (2d Cir. 1982) (*citing Jackson v. Virginia*, 443 U.S. 307 (1979)), *cert. denied*, 459 U.S. 1174 (1983). Defendant, therefore, bears a very heavy burden. *United States v. Carson*, 702 F.2d 351, 361 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983).

We find that the defendant clearly failed to meet his heavy burden with regard to the three mail fraud convictions. The government presented ample evidence from which a jury could find beyond a reasonable doubt that defendant conducted a scheme to defraud and the use of the mails in furtherance thereof. Although a closer question, we also find that the record provides sufficient evidence for a jury to find, beyond a reasonable doubt, defendant guilty of tampering with a witness.

A. Mail Fraud

To establish mail fraud, the government "must show that the defendant (1) participated in a scheme to defraud; and (2) knowingly used the mails to further the scheme." *United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.), *cert. denied*, 464 U.S. 853 (1983). *See United States v. Corey*, 566 F.2d 429, 430 n.2 (2d Cir. 1977); *United States v. Cyphers*, 556 F.2d 630, 632 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977). In addition, "[p]roof of a fraudulent scheme requires evidence showing a specific intent to defraud." *Gelb*, 700 F.2d at 879. *See also United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) ("to make out a mail fraud violation, the Government must show that the scheme was devised with the specific intent to defraud, . . . that the use of the mails in furtherance of the scheme was reasonably foreseeable, . . . that . . . any nondisclosures or affirmative misrepresentations must have been material, . . . [and] that some actual harm or injury was at least contemplated . . ."). (citations omitted), *cert. denied*, 456 U.S. 915 (1982). *But see United States v. Newman*, 664 F.2d 12, 20 (2d Cir. 1981) (not required that government prove contemplation of harm in mail fraud case based upon breach of fiduciary duty by a private employee), *cert. denied*, 464 U.S. 863 (1983).

Evidence that the mails were used in furthering Rodolitz's insurance claim is uncontroverted. Rodolitz, however, claims that the government provided no proof that he acted with an intent to defraud or harm the insurance company or that his activities constituted a fraudulent scheme. He contends that he received only what he was due under the insurance policy, to wit, the actual value of the loss sustained in the windstorm. He urges that any

recovery he may have been awarded in excess of the actual value of the loss was due to a good faith error in estimation of the cost of repair. Rodolitz contends that because he got only that to which he was entitled under the policy, it is of no moment legally that circuitous or deceptive means were employed relative to the manner and cost of repair. For two reasons, we find appellant's argument completely without merit.

First, he argues that he received only that to which he was lawfully entitled under the Massachusetts Bay policy. That policy provides that recovery for damages be limited to the *smallest* of (1) the $3.8 million policy limit, (2) the replacement cost of the property intended for the same use, or (3) the amount actually and necessarily expended in repairing the property. If he sought only that to which he was legally entitled, no necessity existed for Rodolitz to hatch a fraudulent scheme. The evidence shows that Rodolitz opened and used sham bank accounts for a number of business entities. By transferring funds between these accounts, he created an appearance of "arm's length"[2] purchases of materials, some or most of which, according to Blutstein's testimony, Rodolitz already owned. Obviously under such an arrangement Rodolitz was in a position to "purchase" his own materials to repair the roof at whatever price he chose to invoice them to one of his own companies. Based on this evidence, the jury had ample grounds to find that Rodolitz developed and participated in this scheme to successfully recover more from the insurance company than he was lawfully due.

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2 In his brief on appeal, counsel for the defendant stated that the circuitous nature of the purchases may have created the impression of an arm's length transaction. Appellant's Brief at 31.

Second, and more importantly, it was not necessary for the government to prove that Rodolitz recovered more from the insurance company than that to which he was entitled. To sustain the conviction, the government needed to prove only that Rodolitz employed a deceptive scheme intending to prevent the insurer from determining for itself a fair value of recovery. *See United States v. Gelb*, 700 F.2d 875, 879-80 (2d Cir.), *cert. denied*, 464 U.S. 853 (1983); *United States v. Barta*, 635 F.2d 999, 1005 n.14 (2d Cir. 1980); *United States v. Adjmi*, 346 F.2d 654 (2d Cir. 1965).

The evidence of the scheme was overwhelming. Rodolitz used sham business entities and several bank accounts to conceal his direct involvement with all aspects of the roof repair. In fact, he admitted to using circuitous and deceptive means in calculating the cost and manner of repair. Thereafter, it was a virtually inescapable conclusion that Rodolitz intended to defraud the insurance company by preventing the company (and the state court jury) from determining, on the basis of accurate data, how much Rodolitz was entitled to recover. There was ample evidence upon which the jury could have found the defendant guilty beyond a reasonable doubt of mail fraud and we affirm the three mail fraud convictions.

B. Tampering with a Witness

Rodolitz also alleges insufficient evidence as a matter of law to convict him of tampering with a witness. Section 1512 of 18 U.S.C. provides in pertinent part that: "whoever knowingly . . . engages in misleading conduct toward another person, with intent to . . . influence the testimony of any person in an official proceeding . . ."

shall violate the statute. It is undisputed that Rodolitz urged Blutstein to tell a false story to the grand jury about Bolla Supply. This story revolved around Bob Smith, a business associate of Blutstein, who had recently died. Rodolitz suggested to Blutstein that they say Smith had been the manager of Bolla Supply. To flesh out the story, Rodolitz suggested that he and Blutstein maintain that Rodolitz had given Smith building supplies to sell on consignment through Bolla Supply and that subsequently Rodolitz needed the supplies. As a result, Rodolitz purchased the supplies from Smith, according to the story, allowing Smith to realize a modest profit on the transaction. Rodolitz told Blutstein they needed to tell this story to allow Rodolitz to get the proper value for the roofing supplies from the insurance company.

Relying on *United States v. King*, 762 F.2d 232 (2d Cir. 1985), Rodolitz asserts there can be no misleading conduct when a witness is asked to tell a story the witness knows is false. *King* held that if a defendant simply tries to persuade a witness to mislead the government, but in no way misleads the witness, the defendant has not violated section 1512. *Id.* at 237. *See United States v. Beatty*, 587 F. Supp. 1325, 1331-33 (E.D.N.Y. 1984) (the legislative history of section 1512 demonstrates that the section does not proscribe conduct that, without being misleading or threatening, induces others to lie to federal law enforcement officials; Congress included such a proscription in an earlier version of the legislation, but that version was deleted before final enactment). In *King* the defendant attempted to convince a witness to lie before a grand jury by telling a story that both the witness and the defendant knew was false. Furthermore the witness was

aware of the true purpose for the fabrication, namely, to exculpate the defendant.[3]

The government, however, distinguishes *King* from the case at bar. The government contends that in the instant case, Rodolitz not only asked Blutstein to tell a story they both knew was false, but also made a false statement to convince Blutstein to tell the fabricated story. Based on this reasoning, the court agrees with the government that *King* is not controlling.

Section 1515(3)(A) of 18 United States Code defines misleading conduct for purposes of section 1512 as "knowingly making a false statement." 18 U.S.C. § 1515(3)(A). The most obvious example of a section 1512 violation may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury. In contrast, in the instant case, defendant made false statements to convince Blutstein to lie to the grand jury. Although different in context and purpose, both situations involve the making of false statements, and therefore, according to section 1515, both involve misleading conduct under section 1512. In giving the statutory language its fair meaning, the court must find that making false statements to convince another to lie falls squarely within the definition of "engaging in misleading conduct toward another person" under section 1512.

In this case, if the jury could fairly and logically have found the statement made by Rodolitz to Blutstein to

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3 The story which defendant King sought to have the witness tell the grand jury was that King's brother, rather than King himself, was implicated in a counterfeiting scheme which the grand jury was considering. *King*, 762 F.2d at 236-37.

have been false, then the making of such statement would constitute misleading conduct under the statute. Accordingly we must determine (1) whether the government offered sufficient evidence that Rodolitz made false statements to Blutstein and (2) whether the jury could reasonably conclude that Rodolitz made the statements with the intent to influence Blutstein's testimony before the grand jury.

At trial, Blutstein testified about a statement that Rodolitz made to him. The government claims that by making this statement, Rodolitz violated section 1512. Blutstein related Rodolitz's statement as follows:

> He told me he had a large roof repair to do and that he had roofing supplies he had accumulated over the years in storage, over all the years he was in the construction business, and that he needed Bolla Supply to act as the . . . apparent seller of the supplies to the company doing the roofing . . . [i]n order to use the supplies and get the proper value . . . from the insurance company.

According to the evidence at trial, the truth or falsity of this statement hinges on Rodolitz's meaning of "proper value." In the context used, the statement is open to a number of interpretations. In assessing the evidence, however, the court must view it most favorably to the government, and construe all permissible inferences in the government's favor. Based on these standards, the court finds that the jury could fairly and logically have concluded that in using the term "proper value," Rodolitz meant "the full insurance proceeds to which he was lawfully entitled." The evidence introduced at trial demonstrates such a statement to be clearly false. Therefore,

the jury had ample evidence upon which to find that defendant's statement constituted misleading conduct.

We now turn to whether there was sufficient evidence for the jury to conclude that Rodolitz made the false statement with intent to influence Blutstein's testimony. In its brief, the government indicates that Rodolitz told Blutstein this version of the "truth" when Blutstein asked why they simply did not tell the truth. At trial, however, Blutstein merely testified that this statement described the truth as told to him by Rodolitz. Blutstein made no representation as to when Rodolitz so stated. Regardless of the circumstances under which Rodolitz made the statement, however, we find that the jury "fairly and logically" could have concluded that Rodolitz's purpose in so doing was to persuade Blutstein that lying was justified. *Carson*, 702 F.2d at 361. *See Glasser v. United States*, 315 U.S. 60, 80 (1942).

In sum, the court finds that using misrepresentation to convince someone to lie to the grand jury falls squarely within the prohibitions of section 1512. In addition, the government presented sufficient evidence upon which the jury could have concluded that Rodolitz engaged in misleading conduct toward Blutstein in an effort to influence Blutstein's testimony before the grand jury. Therefore, the court finds that defendant failed to meet the heavy burden the law imposes on him in his claim that the government failed to introduce sufficient evidence to sustain his conviction.

C. Other Points of Appeal

Appellant argues other points of error by the trial court. Most notably, appellant contends that the court incorrectly instructed the jury with regard to New York

insurance law with respect to damages as it pertains to the mail fraud counts. Because we find the fraud required for mail fraud inherent in the circuitous and deceptive means of substantiating the insurance claim, rather than simply in the amount recovered, defendant was not prejudiced by the court's charge with respect to damages recoverable under the insurance policy in the state court proceeding and we do not reach the validity of the court's instruction in that regard.

We have considered appellant's other alleged points of error and find them without merit.

CONCLUSION

We affirm the district court's convictions for three counts under 18 U.S.C. § 1341(a), and one count under 18 U.S.C. § 1512(a)(1).

DENIAL OF IN BANC RELIEF

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 15th day of May one thousand nine hundred and eighty-six.

UNITED STATES OF AMERICA,

Appellee,

—V.—

ABRAHAM J. RODOLITZ

Defendant-Appellant.

Docket No. 85-1112

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED MAY 15 1986
ELAINE B. GOLDSMITH, CLERK

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant ABRAHAM RODOLITZ

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX B

APPENDIX B

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protecton of the laws.

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APPENDIX C

APPENDIX C

Title 18

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.)

Title 18

§1512. Tampering with a witness, victim, or an informant

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer of judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.